No. 83-

83-335

Office Supreme Court,
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CLERK

IN THE

Supreme Court of the United States

October Term, 1983

AMERICAN JEWISH CONGRESS,

Petitioner,

v.

UNITED STATES DEPARTMENT
OF THE TREASURY

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Question Presented

Whether the Court of Appeals, which approved the Department of the Treasury's contention that a certain document could be withheld from the public under the Freedom of Information Act's national security exemption, applied the proper standard of *de novo* review to the Department's national security claim where the withheld document contained only statistics on foreign investments in the United States collected pursuant to the International Investment Survey Act and which Act imposes on the agency the duty, to the extent "necessary and feasible," to publish such data for the use of the public.

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Opinions Below

The United States Court of Appeals for the District of Columbia Circuit did not issue an opinion in this case, pursuant to its Local Rule 13(c). Its judgment is reproduced at 1a.*

The opinion of the United States District Court for the District of Columbia Circuit is reported at 549 F. Supp. 1270 (D.D.C. 1982), and is reprinted at 3a. The judgment of the District is reproduced at 23a.

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 1, 1982. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

Statutory Provisions Involved

The case presents questions arising under the Freedom of Information Act, 5 U.S.C. §552(b)(1), an Executive Order providing for the classification of national security information, Executive Order 12065, and the International Investment Survey Act, 22 U.S.C. §3101, *et seq.* These provisions are reprinted at 73a.

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* References to the materials in the appendix are cited as "—a".

Statement of the Case

Ever since Germany used its investments in other countries as a form of economic warfare in the years preceding World War II, see Acheson, *The Place of Bretton Woods In Economic Collective Security*, Dept. of State, Conference Series No. 67 (1945), there has been an uneasy recognition that such investments have a significance far beyond that which their magnitude would otherwise justify. That recognition ripened into a fear of undue foreign influence as a result of the swelling of OPEC investments in the wake of the increase in oil prices imposed after the 1974 oil boycott.

While the United States has not sought to exclude foreign investment, Congress, under its constitutional authority to regulate foreign commerce, has enacted statutes designed to garner information about foreign investment. The most recent of these statutes, the International Investment Survey Act of 1976, 22 U.S.C. §3101, *et seq.* [76a], in a departure from its predecessors, the Bretton Woods Act, 22 U.S.C. §286 [74a] and the Foreign Investment Survey Act of 1974, P.L. 93-479, 88 Stat. 1450, made publication of the data collected an integral and explicit element of the statutory scheme, 22 U.S.C. §3103(a)(4). [80a]

Against this background, in March 1981 petitioner American Jewish Congress* (hereafter "AJCongress"), by letter [25a], filed a Freedom of Information Act ("FOIA") request with the Department of Treasury,

* The American Jewish Congress is a New York not-for-profit membership corporation organized for, *inter alia*, charitable, educational and religious purposes. It has a national membership of about 30,000.

which, as modified by negotiation, sought documents containing the most recent figures on the aggregate bank deposits and U. S. Treasury bills held by all "foreign persons from Saudi Arabia, Kuwait and the United Arab Emirates." The term "foreign persons" was defined, at it is in the International Investment Survey Act of 1976 ("Survey Act"), 22 U.S.C. §3102(3) and (5), to include foreign governments. Petitioner also sought copies of any agreements not to publish investment figures for these countries.

The Department of Treasury, admitting the existence of a document listing the investments of the three countries, denied the request, claiming that the document was (1) specifically exempted from disclosure by other statutes (FOIA Exemption 3, 5 U.S.C. §552(b)(3)) [73a], and (2) was properly classified in the interest of foreign affairs under criteria established by Executive Order 12065 [85a] and was therefore exempt from disclosure (FOIA Exemption 1, 5 U.S.C. §552(b)(1)).* Petitioner was informed orally that there were no written agreements with foreign governments which required Treasury to protect the secrecy of the withheld document. An administrative appeal was denied. [35a]

In a FOIA action brought by AJCongress, the United States District Court for the District of Columbia granted summary judgment to Treasury on its Exemption 1 claim.** [3a] Notwithstanding the obligation to collect and publish the data requested by AJCongress under the Survey

* Treasury claimed that the withheld document was properly classified under §1-301(d) of Executive Order 12065 permitting classification of "foreign relations or foreign activities" information.

** The District Court rejected Treasury's Exemption 3 claim, a holding left undisturbed by the Court of Appeals, and not at issue here. [8a]

Act, the District Court held, upon its review of affidavits submitted by Treasury officials, but with no trial thereon, that there was a sufficient showing under Exemption 1 of the FOIA to justify the refusal to disclose.

The affidavits made three arguments. First, Treasury officials averred that disclosure of the document would breach the duty to "uphold the usual standards of international practice with respect to financial confidentiality." Schotta Affidavit ¶3 [49a]; Consolidated Affidavit of C. Dirck Keyser ¶8. [59a]*

Second, Treasury's affidavits contended that decisions by countries where to hold reserves or surpluses, particularly in respect of countries with large surpluses, can be viewed as in part "political" decisions, with possible "political" ramifications both in the domestic politics of the country in question, and world wide. There is considerable risk of those political ramifications should Treasury release the information in question. Those political ramifications could cause "identifiable damage" to the foreign policy of the United States in respect to these countries." Leland Affidavit. [44a]

Finally, the affidavits stated that Treasury had promised the governments in question that the information disclosing the size of all investments from each country would not be disclosed, that disclosure would "greatly impair our foreign relations with these, and perhaps other, foreign

* "Disclosing information about those holdings would not only affect our relations with the countries involved, but might lead other countries to question whether their holdings will be held in confidence; our relations with those other countries also could be adversely affected." *Id.*, Keyser Affidavit. [42a]

nations" and that the three governments had been assured that, for Mideast OPEC countries, the United States would continue to publish only area aggregate data. Schotta Affidavit ¶¶6, 7. [51a]*

In his consolidated affidavit, C. Dirck Keyser at ¶39 [70a] stated that, in deciding whether to classify the withheld document, he had considered the command of the Survey Act that, to the extent "necessary and feasible," 22 U.S.C. §3103(a)(4) [80a], information about foreign investments be made public. Treasury, however, construed the Survey Act to authorize the executive branch to withhold information otherwise publishable under the Survey Act, release of which, in its judgment, may cause harm to foreign relations or national security.** The District Court did not directly address this argument, but found that the Act did not mandate publication, although it found Treasury's position was bottomed on "a desire to preserve 'special preferential treatment' provided OPEC countries." [22a]

In passing on the sufficiency of Treasury's showing, the District Court was required by the FOIA, 5 U.S.C. §552(a)

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* Treasury routinely publishes the sum of foreign investments in the United States from other countries, even where, as in the case of Canada, the bulk of such investment is made by foreign government agencies. [13a]

** Treasury officials disavowed any suggestion that the document was classified in order to ensure that the three countries would not remove their funds from the U.S., with the concomitant impact on the domestic economy. Schotta Affidavit ¶¶7-9. [51a-52a] Nothing in any of the affidavits showed that the concerns of these three countries would not be as applicable to other countries, or that the harm to United States foreign policy arose from circumstances which did not exist when the Survey Act was enacted by Congress.

Treasury also submitted an *in camera* affidavit from Schotta. The District Court stated that, while the affidavit supported the Department's contentions, it had not relied on it. Counsel for petitioner were not permitted to see this affidavit. [19a]

(4)(B) [73a] to apply a standard of "de novo" review. In FOIA Exemption 1 cases, ordinarily involving foreign intelligence, military or state secrets, the D.C. Circuit applies a well settled rule, *Gardels* v. *CIA*, 689 F.2d 1100 (D.C. Cir. 1982). Under this rule, the district courts must examine government's Exemption 1 claims to see if they "survive the test of reasonableness, good faith, specificity, and plausibility," *Gardels* v. *CIA*, *supra*, 689 F.2d at 1105.* If the claim meets this standard it must be upheld regardless of whether the District Court agrees in full with the agency's evaluation of possible harm to the national security. *Id.*

This Court addressed the standard of review in FOIA Exemption 1 cases in *EPA* v. *Mink*, 410 U.S. 73 (1973), in which it held that the courts, in deciding FOIA Exemption 1 cases, were not empowered to review anything other than the fact that the document had in fact been classified. In response to this holding, Congress, overriding a Presidential veto, revised the FOIA in 1974 to require "de novo" judicial review of Exemption 1 claims, 5 U.S.C. §552(a)(4)(B). The *Gardels* rule is the D.C. Circuit's interpretation of the *de novo* review requirement of the revised FOIA. This Court, however, has addressed neither the impact of the *de novo* review requirement of the revised FOIA on Exemption 1 claims, nor the correctness of the *Gardels* rule.

In this case, which does not involve foreign intelligence, military or state secrets, but statistical data about foreign investments in the United States which Congress in the

* *Gardels* is merely the latest in a series of cases enunciating this rule. *See, e.g., Military Audit Project* v. *Casey*, 656 F.2d 724 (D.C. Cir. 1981); *Phillippi* v. *CIA*, 655 F.2d 1325 (D.C. Cir. 1981); *Baez* v. *Dep't of Justice*, 647 F.2d 1328 (D.C. Cir. 1980); *Lesar* v. *Dep't of Justice*, 636 F.2d 472 (D.C. Cir. 1980); *Hayden* v. *NSA*, 608 F.2d 1381 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 937 (1980); *Ray* v. *Turner*, 587 F.2d 1187 (D.C. Cir. 1978).

Survey Act directed to President to publish, the District Court felt compelled under the *Gardels* standard of review to accept Treasury's claim of harm to foreign relations, notwithstanding its concomitant finding that the claim was "rather ambiguous and speculative." [20a] On June 1, 1983, in an unpublished *per curiam* opinion, the Court of Appeals affirmed "[g]enerally for the reasons stated by the District Court. . . ." [2a]

Reasons for Granting the Writ

In this case, the executive branch has been permitted to accede to demands from Mideast members of OPEC that it conceal from the U. S. public information about the nature and size of OPEC investments in this country in the face of a statutory command to publish that very data. The document which was withheld contains data collected by the Department of the Treasury under the International Investment Survey Act, which calls for, and was specifically enacted in the wake of the Arab oil boycott and the concomitant increase in OPEC investments in the United States to require, the collection of such information and its publication, *see, e.g.*, 122 Cong. Rec. H 31594 (daily ed. Sept. 21, 1976) (statement of Rep. Whalen). The scope of information that the executive branch may classify has, as a result of the decisions below, been expanded to include basic economic data of vital concern to the shaping of public policy (both domestic and international) but unrelated to intelligence sources and methods, or military or state secrets—the traditional areas of national security classification.

The Freedom of Information Act expresses, as this Court has recognized on several occasions, a "broad mandate . . . to provide for open disclosure of public information," ***Baldridge*** v. ***Shapiro,*** 103 S.Ct. 1103, 1108 (1982)

in order "to ensure an informed citizenry, vital to the functioning of a democratic society," *FBI* v. *Abramson*, 102 S.Ct. 2054, 2059 (1982), citing, *NLRB* v. *Robbins Tire & Rubber Co.* 437 U.S. 214, 242 (1973). This Court should review the result here because (1) it is flatly in conflict with the general purpose of the FOIA and the Survey Act and (2) as explained later, it continues a misapplication of a standard of *de novo* review ordered by Congress under the FOIA after this Court's decision in *EPA* v. *Mink*, 410 U.S. 73 (1973).

As this case illustrates, few issues under the Freedom of Information Act are as troublesome or controversial as the standard of review to be applied where the government asserts that documents are exempt from FOIA disclosure on national security grounds. This Court recognized the importance of the issue when it granted certiorari in *EPA* v. *Mink, supra.* There this Court held that the judiciary was not empowered to review the merits of a decision by the executive branch to classify a document. The courts were permitted only to determine that the document had in fact been classified. Congress reacted adversely to this decision, and acted swiftly to allow the courts to review the propriety of classification decisions.

Two different approaches emerged.* The first would have empowered the courts only to determine whether the

* The history of the Congressional reaction to *EPA* v. *Mink* is recounted in *Ray* v. *Turner, supra.* The legislative materials are collected in Committee on Government Operations, Subcommittee on Government Information and Individual Rights and Senate Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, *Freedom of Information Act and Amendments of 1974 (P.L. 93-520) Source Book: Legislative History, Texts, and Other Documents* (1975) [hereafter *Source Book*].

classification decision was "reasonable", the second called for *de novo* judicial review. Congress overwhelmingly opted for the second alternative under which, in Senator Ervin's words, the question "ought to be whether classifying the documents . . . was a correct or incorrect decision," not whether the agency acted "reasonably or unreasonably in reaching the wrong decision." [Source Book at 324] In vetoing the bill because, in his view, it gave the courts too much power to declassify information, President Ford proposed a compromise:

> [W]here classified documents are requested the courts could review the classification, but would have to uphold the classification if there is a reasonable basis to support it. (Source Book at 484).

Congress did not accept this proposal; it overrode the veto. The D.C. Circuit's *Gardel's* standard* in practice, however,

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* Following the lead of the D.C. Circuit, this standard has been adopted in all of the other circuits which have considered the matter: *Ingle* v. *Dep't of Justice*, 698 F.2d 259 (6th Cir. 1983); *Stein* v. *Dep't of Justice*, 662 F.2d 1245 (7th Cir. 1981); *Diviaio* v. *Kelley*, 571 F.2d 538 (10th Cir. 1978); *Bell* v. *U.S.*, 563 F.2d 484 (1st Cir. 1977); *Maroscia* v. *Levy*, 569 F.2d 1000 (7th Cir. 1978); *Raven* v. *Panama Canal Co.*, 583 F.2d 169 (5th Cir. 1978); *cf. Alfred A. Knopf, Inc.* v. *Colby*, 509 F.2d 1362 (4th Cir. 1978); 1 O'Reilly, *Federal Information Disclosure* §§11.12, 11.13 (1983).

The Courts have largely relied on certain language in the Conference Committee report which they apparently view as inconsistent with the legislative history summarized in the text:

> However, the conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [*sic*] might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that federal courts, in making *de novo* determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record. H. Rep. 93-1380 reprinted in Source Book at 219.

The fact that the legislative history is less than clear is an additional reason for this Court to grant a writ of certiorari.

is a return to the position espoused in President Ford's veto message, not the act as passed by Congress over his veto.

Indeed, the Seventh Circuit in *Stein* v. *Dep't of Justice*, 662 F.2d 1245, 1253 (7th Cir. 1981) observed that the courts do not make a true *de novo* appraisal of a classification decision, but rather only review the sufficiency of the affidavits supporting the classification decision. One commentator puts the current status of Exemption 1 review as follows:

> Because the 1974 amendments opened the issue of proper classification to a certain amount of judicial second guessing, but restrained the field of judicial choice to the standards set in the Executive Order, judges have a poorly defined scope of authority within which to open documents to public scrutiny over agency objection. 1 O'Reilly, *Federal Information Disclosure* §11.02 (1983) at p. 11-6.

Review by this Court would provide the lower federal courts with a definitive statement of the correct standard of review for FOIA Exemption 1 cases. The outcome in this case illustrates the misuse of "*de novo* review" as practiced in the District of Columbia Circuit where a claim found by this District Court to be "ambiguous and speculative" [20a] is nevertheless conclusive of the propriety of classification, even when publication would not reveal foreign intelligence sources or methods or military or state secrets. The necessity for review is heightened by the existence of provisions of the Internal Investment Survey Act which call for publication of the data on the withheld—and classified—document.

Conclusion

For the reasons stated, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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Judgment of the U.S. Court of Appeals for the District of Columbia Circuit

Judgment of the U.S. Court of Appeals

NOT TO BE PUBLISHED—SEE LOCAL RULE 8 (f)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

[No Opinion]

No. 82-2424 September Term, 1982

Action No. 81-01745

AMERICAN JEWISH CONGRESS,

Appellant

v.

UNITED STATES DEPARTMENT OF THE TREASURY

Appeal from the United States District Court for the District of Columbia.

Before WRIGHT and MIKVA, Circuit Judges, and WEIGEL,* Senior District Judge.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was briefed and argued by counsel. The

* Of the United States District Court for the Northern District of California, sitting by designation pursuant to 28 U.S.C. § 294(d) (Supp. V 1981).

issues presented have been fully considered by the court; they occasion no need for an opinion. *See* D.C. Cir. Rule 13(c).

Generally for the reasons stated by the District Court in its Memorandum Opinion (*see American Jewish Congress* v. *Dep't of the Treasury*, 549 F. Supp. 1270 (D. D.C. 1982)), it is

ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this cause is hereby affirmed.

It is FURTHER ORDERED by this court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 14, as amended November 30, 1981 and June 15, 1982.

Per Curiam

For the Court

/s/
George A. Fisher
Clerk

Memorandum Opinion of the U.S. District Court for the District of Columbia

AMERICAN JEWISH CONGRESS,

Plaintiff,

v.

DEPARTMENT OF THE TREASURY,

Defendant.

Civ. A. No. 81-1745

United States District Court,
District of Columbia.

Oct. 27, 1982

Joel H. Levy, Cohn & Marks, Washington, D.C. for plaintiff.

Kathryn M. Braeman, Sp. Asst. U.S. Atty., Washington, D.C., for defendant.

BARRINGTON D. PARKER, District Judge:

In this proceeding under the Freedom of Information Act (FOIA or Act), 5 U.S.C. § 552 (1976), the American Jewish Congress (AJC) seeks to obtain from the Department of the Treasury (Department or Treasury) a copy of a document containing the most recent aggregate figures showing the amount of monies in United States banks deposited by, and the amount of Treasury bills owned or held by, foreign persons from three Arab countries—Saudi

Arabia, Kuwait, and the United Arab Emirates. The Department denied the request and relied on two FOIA exemptions: Exemption (b)(3), 5 U.S.C. § 552(b)(3), and Exemption (b)(1), 5 U.S.C. § 552(b)(1).

The parties have fully briefed and argued the legal issues. There are no significant material facts in dispute. The matter is presented to the Court upon the parties' cross-motions for summary judgment.

For the reasons set forth below the Court determines that although Exemption (b)(3) is inapplicable here, Treasury has properly invoked Exemption (b)(1) of the FOIA. The American Jewish Congress' request for the documents, therefore, is denied and the complaint dismissed.

Background

The material facts may be briefly stated. The Department denied disclosure to the plaintiff on two grounds. First, disclosure of the country aggregates would reveal holdings of specific investors which are government entities. Such disclosure, the Department argues, is specifically prohibited by Exemption (b)(3) of the FOIA, which is applicable to documents "expressly exempted from disclosure by statute." Second, disclosure of the requested information revealing the holdings of government investors would cause identifiable damage to the foreign relations of the United States. This ground invokes Exemption (b)(1) of the FOIA, which is applicable to documents "specifically authorized . . . to be kept secret in the interest of national defense or foreign policy." In

this connection the government also relied upon Executive Order 12065, 3 C.F.R. 190 (1979).

As to Exemption (b)(3), two statutes are cited by the government: The Bretton Woods Agreements Act (Bretton Woods Act), 59 Stat. 515, 22 U.S.C. § 286f, and the International Investment Survey Act of 1976 (Survey Act), 22 U.S.C. §§ 3101 *et seq.* Both Acts provide for the gathering of information on foreign investment in the United States. Section 8(a) of the Bretton Woods Act authorizes the President to "require any person to furnish such information as the President may determine to be essential to comply with [a request for information from the International Monetary Fund]," 22 U.S.C. § 286f(a). The International Monetary Fund requires the United States to furnish information on the portfolio investments of foreign investors in the United States. Section 4(c)(1) of the Survey Act requires the President to conduct a "comprehensive benchmark survey of foreign portfolio investment in the United States at least once every five years . . . ." 22 U.S.C. § 3103(c)(1). In order to collect that information, the Act authorizes the Secretary of the Treasury to promulgate regulations which "may require any person subject to the jurisdiction of the United States . . . to furnish, under oath, any report containing information which is determined to be necessary to carry out the international investment surveys and studies conducted under [the] Act." Section 5(b)(2), 22 U.S.C. § 3104(b)(2).

Pursuant to those statutes, the Department of the Treasury's Office of International Financial Reports prepares statistical reports and analyses of the portfolio in-

vestments in the United States by foreign residents.[1] The portfolio investment data collected on Treasury's report forms include bank deposits and Treasury bills, the two types of portfolio investment which are the subject of the plaintiff's FOIA request.[2]

Since 1934, Treasury has required banks and other reporters to furnish information on the liabilities of U.S. institutions to "foreigners." The present report forms separately identify portfolio holdings of several broad categories of "foreigners," including "foreign official institutions," "unaffiliated foreign banks," and "all other foreigners." The report forms are submitted to a Federal Reserve bank, where they are then coded into a computer system. Since 1935, the Department has published tables summarizing the information which it has collected.[3]

Prior to 1974, the figures for Middle East countries were published on a country-by-country basis, as is the case with other countries. In 1974 the revenues of oil-exporting countries substantially increased and the Treasury Department began publishing the data for oil-exporting countries in the Middle East and Africa solely on a regional basis. Thus, the Department publishes the aggregate portfolio holdings of Bahrain, Iran, Iraq, Kuwait,

1. Portfolio investment is defined in the Survey Act to mean, in effect, all international investment involving the "ownership or control, directly or indirectly, by one person of [less than 10 percent] of the voting securities of an incorporated business enterprise or an equivalent interest in an unincorporated business enterprise." 22 U.S.C. § 3102(10), (11).

2. Consolidated Supplemental Affidavit of C. Dirck Keyser, Director of the Office of International Financial Reports at the Department of the Treasury (March 26, 1982) at ¶ 4.

3. *Id.* at ¶¶ 5, 6.

Oman, Qatar, Saudi Arabia, and the United Arab Emirates; it does not break down, on a country-by-country basis, these aggregate figures.[4]

On March 12, 1981, the AJC requested access to all Treasury documents relating to the aggregate investment in U.S. banks and purchase of U.S. Treasury bills by individuals or governments in 16 Arab countries.[5] The request was later orally modified to include information on only three countries—Saudi Arabia, Kuwait, and the United Arab Emirates. The Department denied the request and a subsequent appeal.[6] The AJC then sought relief through this FOIA proceeding.

The only Treasury record at issue in this case is a portion of a table titled "Estimated Outstanding Portfolio Investment in the United States of Oil-Exporting Countries as of Year-End 1980."[7] Figures showing country aggregates have been expurgated from that table. The table was prepared in February 1981 and classified "Confidential" on February 2, 1981.[8]

The Department provided two reasons for its decision to withhold the information. First, it stated that the two statutes trigger Exemption (b)(3) and preclude Treasury from disclosing the information sought by the plaintiff. In each of the three Arab countries, the government or governmental financial institutions hold most of the country's portfolio investments. Thus, by revealing the aggregate figure

4. *Id.* at ¶ 7.

5. Complaint, Exh. A.

6. *Id.*, Exhs. B, D.

7. Defendant's Motion for Summary Judgment, Exh. A.

8. Keyser Aff. (Sept. 21, 1981) at 3.

for a particular country's investments, Treasury would, it asserted, indirectly reveal the investment of a particular government or governmental authority. Both statutes prohibit disclosure of the investments of an individual investor, and, therefore, Treasury concluded that the requested document was exempt from disclosure under FOIA. Second, the Department relied upon Exemption (b)(1) and refused the requested document, asserting that it was protected because of national defense or foreign policy concerns.

Legal Analysis

As in any FOIA case, the Court is required to "determine the matter *de novo*, and . . . the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B). A document can only be withheld from the requester if the information falls within one of nine enumerated exemptions. 5 U.S.C. § 552(b). Summary judgment is warranted if the agency affidavits provide the justification for non-disclosure with reasonably specific detail; demonstrate that the information withheld falls logically within the claimed exemption; and are not controverted either by contrary evidence in the record or by evidence of agency bad faith. *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C.Cir.1981).

A.

The (b)(3) Exemption

Section 552(b)(3) exempts from disclosure matters that are . . . specifically exempted from disclosure by statute . . . provided that such statute (A) requires that

> the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

In asserting this exemption, Treasury relies on confidentiality provisions contained within both the Bretton Woods and the Survey Acts. The Bretton Woods Act includes two such provisions. Section 8(c), 22 U.S.C. § 286f(c), states:

> It shall be unlawful for any officer or employee of the Government, or for any advisor or consultant to the Government, to disclose, otherwise than in the course of official duty, any information obtained under this section, or to use any such information for his personal benefit.

In addition, section 8(a), 22 U.S.C. § 286f(a), mandates that no information acquired in response to a request by the International Monetary Fund "shall be furnished to the Fund in such detail that the affairs of any person are disclosed." Treasury argues that if the government cannot disclose the investment of "any person" to the Fund, then clearly such a disclosure cannot be made to the public.

The confidentiality provision of the Survey Act prohibits the publication of "any information collected pursuant to subsection (b)(2) of this section in a manner that the person who furnished the information can be specifically identifiable except as provided in this section." The subsection continues:

> No person can compel the submission or disclosure of any report or constituent part thereof collected pursuant to this chapter, or any copy of such report or

> constituent part thereof, without the prior written consent of the person who maintained or furnished such report under subsection (b) of this section and without prior written consent of the customer, where the person who maintained or furnished such report included information identifiable as being derived from the records of such customer.

22 U.S.C. § 3104(c). The subsection also includes restrictions on access to such confidential information by other agencies in the Executive Branch.

The government's statutory argument is that the information sought by the American Jewish Congress qualifies as "detail" which discloses "the affairs of any person," in the language of the Bretton Woods Act, and as "information identifiable as being derived from the records of [a] customer," in the language of the Survey Act. The premise for the argument is that, beginning in 1974, official governmental authorities in the OPEC countries began to overwhelmingly dominate the portfolio investing within those countries. Because such a large percentage of the portfolio investments from those countries is held by the government, release of the information sought by the American Jewish Congress would be "tantamount to disclosure of the holdings in the United States of particular official monetary or financial authorities in each of these countries."[9]

The contention is flawed. First, the premise for the argument is highly questionable. The link between the raw data sought by the plaintiff and the investments held by a particular investor is approximate. Neither Act restricts the release of data which, through approximation or inter-

9. Consolidated Supplemental Keyser Aff. at ¶ 32.

polation, might provide a rough idea of the holdings of an individual investor.

Moreover, Treasury's argument is particularly unappealing in this case since it is the Department itself which has furnished the data for those students of the world economy who might seek to determine the approximate governmental holdings of these Arab countries. Apparently, it is generally known among international economists that the bulk of the investment from the OPEC countries is made by the governmental authority.[10] However, the most exact statement of the percentage of official investment provided the Court is contained within a document which Treasury submitted to a congressional subcommittee in 1978.[11] The document provides the percentage for five OPEC countries in columns marked "50-60", "60-70", "70-80", and "80-100". Such data are, of course, highly approximate and do not provide the sort of information prohibited by the statutes. But even if the data were more precise, Treasury cannot, in good faith, argue that its release of such information bars it from now publishing another set of data which, were it not for the earlier information, would be publishable. Tolerance of such a subterfuge would wreak havoc with the FOIA.

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10. *See* Aff. of Charles Schotta, Deputy Assistant Secretary of the Treasury for Commodities and Natural Reseources (March 26, 1982) at ¶ 5.

11. "Portfolio Transactions in the U.S. by Official Institutions of Mid East Oil Exporters as Proportion of that Country's Total Transactions," Defendant's Motion for Summary Judgment, Exh. B. The document was provided in 1979 to the Subcommittee on Commerce, Consumer and Monetary Affairs of the House Committee on Government Operations. Consolidated Supplemental Keyser Aff. at ¶ 30.

Second, the legislative history of the Survey Act further undermines the statutory argument. The purpose of the Act was to provide "clear and unambiguous authority for the President to collect information on international investment and to provide analyses of such information to the Congress, the executive agencies, and the general public." Section 2(b), 22 U.S.C. § 3101(b). The overall purpose of the Act was to encourage as much disclosure of information on foreign investment as possible.[12] Furthermore, the legislative history of the Act makes clear that Treasury may release "aggregate statistical data", such as that sought by the American Jewish Congress.[13]

Finally, Treasury's interpretation and implementation of the requirements of the Acts run counter to the mandate of Exemption (b)(3)(A). Subsection (A) is applicable if the statutes "leave no discretion" as to the release of information. Treasury has adopted a policy, however, of withholding a country aggregate only if (1) disclosure of the country aggregate will reveal the investment of an investor *and* (2) the investor requests that the investment not be disclosed.[14] Thus, even though most of the Canadian

12. *See* H.R.Rep. No. 93-1183, 93rd Cong., 2d Sess. 1-3 (1974), U.S.Code Cong. & Admin. News 1978, p. 5957. The report examines the Foreign Investment Study Act of 1974, 88 Stat. 1450, Pub.L. 93-479, which was the predecessor of the Survey Act.

13. *See, e.g.*, 120 Cong.Rec. S34683-84 (daily ed., Oct. 9, 1979) (statement of Senator Inouye).

14. Defendant's Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 16. The Treasury Department's memorandum cites for this point the testimony of C. Fred Bergsten, Assistant Secretary of the Treasury for International Affairs, in *The Operations of Federal Agencies in Monitoring, Reporting on, and Analyzing Foreign Investments in the United States (Part 2—OPEC Investment in the United States)*, House Committee on Government Operations, 96th Cong., 1st Sess. 215 (1981).

portfolio investment, for example, is held by official institutions, aggregate investment data for Canada are published because, according to Treasury officials, the Canadian government has never objected to such publication.[15] Similar data for individual Communist countries are also published, even though the major investor in those countries is the government; apparently such publication is also permissible, under Treasury's rationale, because those countries have never objected.[16] The statutes fit within (b)(3)(A), however, only if the congressional mandate of confidentiality is "absolute and without exception." *American Jewish Congress v. Kreps*, 574 F.2d 624, 628 (D.C.Cir. 1978). Treasury's own implementation of the two Acts belies the application of the exemption.[17]

In sum, Treasury's statutory argument lacks support in the statutory language, the legislative history, and the Department's own interpretation and implementation.

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15. *Id.* at 214.

16. This information is set forth in H.R.Rep. No. 96-1216, *The Adequacy of the Federal Response to Foreign Investment in the United States*, House Committee on Government Operations, 96th Cong., 2d Sess. 124-25 (1980).

17. Treasury cannot rely on (b)(3)(B), which permits nondisclosure when the statute "establishes particular criteria for withholding or refers to particular types of matters to be withheld." Nondisclosure is permitted under that subsection "if, but only if, the enactment is the product of congressional appreciation of the dangers inherent in a formula whereby the administrator may determine precisely whether disclosure in any instance would pose the hazard that Congress foresaw." *American Jewish Congress v. Kreps*, 574 F.2d at 628-29. No such congressional appreciation or legislative formula in either of the Acts makes available this subsection.

B.

The (b)(1) Exemption

The Court of Appeals for this Circuit recently summarized the guidelines when an agency claims the (b)(1) exemption.

> [W]hat this Court must consider is "*de novo* determination" of the propriety of the withholding, but in doing so the courts "must 'accord substantial weight'" to the Agency's determinations. *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C.Cir.1978). Once satisfied that proper procedures have been followed and that the information logically falls into the exemption claimed, the courts "need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith." *Weissman v. Central Intelligence Agency*, 565 F.2d 692, 697 (D.C.Cir.1977). Conversely, "summary judgment may be granted on the basis of agency affidavits if they contain reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith." *Halperin v. Central Intelligence Agency, supra*, 629 F.2d at 148. The test is not whether the court personally agrees in full with the CIA's evaluation of the danger—rather, the issue is whether on the whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the CIA is expert and given by Congress a special role. *See* S.Rep. No. 93-1200, 93d Cong., 2d Sess. 12, *reprinted in* [1974] U.S.Code Cong. & Ad.News 6267, 6290.

Gardels v. Central Intelligence Agency, 689 F.2d 1100, 1104-1105 (1982).

Section 552(b)(1) allows an agency to withhold materials which are

> (A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to an Executive Order; . . . .

The document in question has been designated "Confidential" pursuant to Executive Order 12065. This designation is limited to information "the unauthorized disclosure of which reasonably could be expected to cause identifiable damage to the national security." § 1-104, 3 C.F.R. at 191.

Section 1-3 of the Order, 3 C.F.R. at 193, establishes the criteria to be applied in determining the propriety of classification. It states that information may not be classified unless it concerns various subject matters, one of which —relied upon by the Department in this case—is "foreign relations or foreign activities of the United States." § 1-301(d), 3 C.F.R. at 193.

The plaintiff's arguments are essentially of four types. First, the AJC argues that the document does not concern "foreign relations or foreign activities of the United States" but, rather, contains data supplied by domestic reporters relating solely to this nation's domestic economy. Second, the AJC claims that even if the information were properly classified, Treasury's power to withhold this document must fall in the face of the Survey Act's requirement

of publication. Third, the AJC states that the government's affidavits fail to disclose with reasonable specificity the harm which would result from disclosure. Finally, the AJC asserts that upholding the Department's decision would allow an agency to circumvent the FOIA simply by promising confidentiality of otherwise disclosable documents.[18]

Neither of the first two arguments need long detain us. First, although the figures were supplied by domestic banks and other domestic reporters, the document, by its very definition, involves investments of "foreigners". According to the government affidavits,[19] the possibility that this document might be released has provoked considerable anxiety in foreign capitals and thus implicates foreign relations concerns. The AJC cites no support for its contention that the government may solely classify documents under the "foreign relations" category if such documents are in fact furnished by a foreign government. Second, although the Survey Act encourages disclosure of this information, such disclosure is not mandated by that Act. If Congress, in enacting the Survey Act, intended to intrude upon the President's power to protect military and state secrets, derived directly from Article II of the Constitution, then clearly the statute and legislative history would be more explicit. *Cf. United States v. Nixon*, 418 U.S. 683, 710, 94 S.Ct. 3090, 3108-3109, 41 L.Ed.2d 1039 (1974).

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18. The AJC also asserts that Treasury has not complied with the procedural requirements of Executive Order 12065. However, the Consolidated Supplemental Keyser Aff. at ¶ 35 makes clear that Treasury has satisfied the procedural criteria as set forth in section 1-501 of the Executive Order.

19. See *infra* at 1277-1278.

The third argument, concerning the specificity of the harm wheih would result from disclosure, requires a review of the several affidavits submitted. The affidavit of Ralph Edwin Bresler[20] states that he is a country officer for Kuwait and Oman at the Department of State and was formerly chief of the economic section at the American Embassy in Kuwait. He states that "[b]ased on discussion I have had with Kuwaiti officials in charge of their investments overseas, I understand that the Government of Kuwait wishes the total amounts of, and details about, its investments in the United States held in confidence." Marc E. Leland, Assistant Secretary for International Affairs of the Department of the Treasury, states in his affidavit that publication of the data could have worldwide "political" ramifications. He further states that he is personally aware that Arab officials "wish that information about their investments in the United States be held in strictest confidence."[21]

The first affidavit of C. Direk Keyser,[22] Director of the Office of International Financial Reports at the Department of the Treasury, is more detailed. Keyser states that he is the official on whose instructions the document was classified "Confidential." He states that:

> The governments in question have on numerous occasions expressed their concern that their investments in the United States be held confidential. The Treasury Department, in part relying on statutory provisions preventing disclosure, has made clear to the

20. Aff. of September 10, 1981.

21. Aff. of October 1, 1981 at 2.

22. Aff. of September 21, 1981.

> governments of the countries concerned, as well as to others, that the confidentiality of their investments in the United States will be maintained and continued. The governments in question have relied on those assurances, as have others. Disclosing the information in question would be a breach of faith by the United States which would not only harm our foreign relations with the countries in question, but could cast doubt on the credibility of our undertakings vis-a-vis other countries.[23]

An affidavit was also submitted by Charles Schotta,[24] Deputy Assistant Secretary of the Treasury for Commodities and Natural Resources. He states that "harm to the national security may be reasonably expected to result from making the requested table public." He adds: "This is principally because, if the data in question are released, the United States Government will have demonstrated to the governments of three Middle East oil exporting countries, Saudi Arabia, Kuwait and the United Arab Emirates, that it is unable or unwilling to maintain its commitments and uphold the usual standards of international practice with respect to financial confidentiality." He further states: "Whenever I have heard officials of the three countries in question express their concerns about the release of country-by-country investment data, they have been assured that the United States Government would

23. Keyser Aff. at 3. Keyser's Consolidated Supplemental Affidavit, submitted on March 26, 1982, provides much detail on the background to and history of the Treasury Department's handling of this information but adds nothing to the rationale for the national security exemption.

24. Aff. of March 26, 1982.

continue to protect the confidentiality of these data and would continue its current practice, which is to publish area aggregates rather than individual country aggregates with respect to their investments."[25]

In addition, Schotta submitted *in camera* a second affidavit which provides further detail on the harm which might result from release of the document.[26] Resort to the *in camera* affidavit was not strictly necessary, since the public affidavits are sufficient to support the Department's claim. However, in view of the important issues at stake, confirmation of the assertions in the public affidavits was deemed essential. Although plaintiff's counsel sought to review the *in camera* affidavit, the Court determined that the danger to national security warranted counsel's exclusion, particularly since presence of counsel would not be necessary to resolve the AJC's claim.[27]

The AJC asserts that the affidavits state in a conclusory fashion nothing more than that disclosure "would be viewed unfavorably by those with whom we have bilateral relations."[28] Thus, it seeks specific information on such items as the type of retaliatory action likely to result from disclosure. This claim appears similar to that made in *Halperin v. CIA*, 629 F.2d 144, 149 (D.C.Cir.1980), where an appellant challenged the CIA's projection of potential harm

25. *Id.* at ¶¶ 3, 6.

26. The Court of Appeals has recognized that, particularly in national security cases, resort to *in camera* proceedings may be necessary or desirable. *Ray v. Turner*, 587 F.2d 1187, 1211 n. 43 (D.C. Cir.1978); *Phillippi v. CIA*, 546 F.2d 1009, 1012 n. 13 (D.C.Cir. 1976).

27. *See Salisbury v. United States*, 690 F.2d 966 at 973-74 n. 3 (D.C.Cir.1982).

28. Plaintiff's Supplemental Memorandum in Support of Cross-Motion for Summary Judgment at 18.

as "pure speculation." The Court commented that "any affidavit or other agency statement of threatened harm to national security will always be speculative to some extent, in the sense that it describes a potential future harm rather than an actual past harm." *Id.* In this Court's view, a claim of breach of faith, while rather ambiguous and speculative, is sufficiently reasonable and plausible to warrant accession to the expert judgment of the Treasury Department officials.

Finally, the Court cannot adopt AJC's argument that the government's rationale would permit the Treasury Department, or any other agency, to "promise its way out of the Freedom of Information Act."[29] Our Circuit Court on at least two occasions has ruled that an agency may withhold a document or documents which would otherwise be disclosable when a foreign government has requested secrecy and when repudiation of that request might impair our foreign relations and thereby impair our national security.

In *Carlisle Tire & Rubber Co. v. U.S. Customs Service*, 663 F.2d 210 (D.C.Cir.1980), an American company sought to compel disclosure of documents held by the Customs Service relating to Customs' investigation of products exported by the Republic of China and the Republic of Korea. Customs relied on (b)(1) to withhold documents consisting of responses by Korea to questionnaires issued to it by Customs. The responses were transmitted to Customs together with an express Korean government request for confidential treatment. The Court upheld the government's position, stating that:

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29. *Id.* at 14.

> To the extent that unauthorized disclosure of these documents would contravene guarantees of confidentiality made to a foreign government, the affidavits suggest their revelation would likely damage the foreign relations of the United States, and hence the national security.

Id. at 217.

In *Wolfe v. Froehlke*, 358 F.Supp. 1318 (D.D.C.1973), *aff'd*, 510 F.2d 654 (D.C.Cir.1974), plaintiff sought disclosure of a Defense Department file concerning the forced repatriation of Russian citizens after World War II. The Defense Department had declared that it had "absolutely no objection" to the release of the file. 358 F.Supp. at 1319 n. 1. However, the documents were not released because the British government had refused to concur in the declassification and Defense officials had determined that unilateral disclosure without concurrence of the British government would be "prejudicial to the foreign relations of the United States." The court upheld the Defense Department's action, and the Court of Appeals affirmed.[30]

The AJC seeks to distinguish this proceeding on the ground that the document withheld was generated by a domestic statute and provides information about the domestic economy. Clearly, the AJC is correct in its argument that the document differs from the more typical (b)(1) Exemption case in which the document itself involves national security information and is not transformed into exempt material through a "promise of confidentiality" to

30. Although the district court decided the case prior to the 1974 amendment to (b)(1) requiring, *inter alia*, *de novo* review of an agency's decision to withhold information, the Court of Appeals' affirmance strongly suggests that the same result would have been reached subsequent to the amendment. 510 F.2d at 655.

a third party. *See, e.g., Military Audit Project*, 656 F.2d at 738-39. There is scant doubt that the Department's assertion of the (b)(1) Exemption in this case is positioned on nothing more than a desire to preserve "special preferential treatment" provided the OPEC countries.[31]

This Court is also mindful, however, of the standard for judicial review of agencies' decisions under (b)(1). Upon review of the entire record, the Department's judgment "survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the [Department] is expert and given by Congress a special role." *Gardels v. CIA*, 689 F.2d 1100. This Court upholds the Department's decision denying the release of the requested document.

An appropriate Order accompanies this Memorandum Opinion.

ORDER

In accordance with the accompanying Memorandum Opinion, it is this 26th day of October, 1982, hereby

ORDERED

That plaintiff's motion for summary judgent is denied and defendant's motion for summary judgment is granted.

Judgment is entered for the defendant and the complaint is dismissed with prejudice.

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31. H.R.Rep. No. 96-1216, *The Adequacy of the Federal Response to Foreign Investment in the United States*, House Committee on Government Operations, 96th Cong., 2d Sess. 120 (1980). The report, after an extensive analysis of the issue, concluded that "[t]he United States Government entered into rather specific, explicit agreements with these OPEC governments designed to attract their investments by the promise of special treatment, including maintaining the confidentiality of their U.S. investments." *Id.*

Judgment Order of the U.S. District Court for the District of Columbia

Judgment Order of the U.S. District Court

FILED
Oct. 27, 1982
JAMES F. DAVEY, Clerk

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1745

AMERICAN JEWISH CONGRESS,
Plaintiff

v.

UNITED STATES DEPARTMENT OF THE TREASURY,
Defendant

ORDER

In accordance with the accompanying Memorandum Opinion, it is this 26th day of October, 1982, hereby

ORDERED

That plaintiff's motion for summary judgment is denied and defendant's motion for summary judgment is granted.

Judgment is entered for the defendant and the complaint is dismissed with prejudice.

/s/

Barrington D. Parker
United States District Judge

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Administrative Proceedings

[LETTERHEAD OF]

AMERICAN JEWISH CONGRESS
Stephen Wise Congress House
154 East 84th Street
New York, N.Y. 10028
(212) 879-4500

COMMISSION ON LAW AND SOCIAL ACTION

March 12, 1981

Department of the Treasury
Freedom of Information Office
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

Dear Sir:

Under the provisions of the Freedom of Information Act, as amended 5 U.S.C. § 552 ("FOIA"), and the regulations of your agecy 31 C.F.R. § 1.1 et seq., the American Jewish Congress seeks access to, and the opportunity to copy, the documents enumerated below relating to certain foreign investments in the United States. The documents include:

1. All documents, files, papers or other compilations listing the magnitude and aggregate value of portfolio international investments, form of international investments, types of investors, nationality of investors and recorded residence of foreign private holders, diversifica-

tion of holdings by economic sector, and holders of record of international investments by persons from:

1. Saudi Arabia
2. Kuwait
3. United Arab Emirates
4. Iraq
5. Iran
6. Algeria
7. Morocco
8. Libya
9. Syria
10. Lebanon
11. Omar
12. Qatar
13. Yemen Arab Republic
14. Peoples Democratic Republic of Yemen
15. Bahrain
16. Islamic Conference

showing the amount of investment from each contry in aggregate form.

As used in this request, the terms "foreign", "person" and "international investment" are defined as those terms are defined in 22 U.S.C. § 3102.

2. Any agreements made by the Department with the governments of Saudi Arabia, Kuwait, United Arab Emirates, Iraq, Iran, Algeria, Morocco, Libya, Syria, Lebanon, Omar, Qatar, Yemen Arab Republic, People's Democratic Republic of Yemen, Bahrain or Islamic Conference in which the Department of the Treasury has agreed not to publish investment figures for these countries other than as a lump-sum for all Mid-East OPEC countries.

Pursuant to 5 U.S.C. § 552 (a)(4)(A), I request a waiver of search and copying fees. The American Jewish Congress is a membership organization of American Jews which has as one of its central purposes enhancing public debate

on, and knowledge of, American Middle East policy. To this end, it publishes periodic reports including "Boycott Report" circulated widely to the public (copies of which are included).

A matter of particular concern to the American Jewish Congress is the growing size of investments by Arab countries in the United States with the concomitant increase in influence by these countries over American foreign policy in the Middle East. The information obtained under this request will be publicized in the Boycott Report and elsewhere and may form the basis for recommendation for further legislation.

It should be noted that the impact of foreign investment on both the domestic economy and foreign policy is quite clearly a matter of public interest, as evidenced by the enactment of the International Investment Survey Act, 22 U.S.C. 3101 et seq. See also H.R. Report 94-1490, 1976 U.S. Code, Congressional and Administrative News Service 4463, 4464.

Sincerely,

/s/ Marc Stern
Marc Stern

[LETTERHEAD OF]

DEPARTMENT OF THE TREASURY

Washington, D.C. 2020

DEPUTY ASSISTANT SECRETARY

May 8, 1981

Dear Mr. Maslow:

In your telephone conversation of April 22, 1981, with Richard Goodman, you narrowed your Freedom of Information Act request, originally made March 31, 1981, and renewed in your letter of April 16, 1981. You stated that you wished copies of a Treasury document or documents which contain the most recent figures describing:

1. The amount of monies on deposit in U.S. banks in the United States; and

2. The amounts of Treasury bills

owned or held by Saudi Arabia, Kuwait, and the United Arab Emirates.

I am responding to your request because I am the Deputy Assistant Secretary for the offices having principal custody of the documents in question, and, under Treasury Regulations, am responsible for initial determinations under the Freedom of Information Act.

All the offices with custody of the pertinent records searched their files for documents containing the information you seek. Basically, the information you seek is contained in a single document, copies of which are maintained

in the Office of International Banking and Portfolio Investment at the Main Treasury Building, and the Office of Statestical Reports. The Foreign Portfolio Investment Survey Project maintains certain of the information you seek in computerized form.

The document we have located contains the information you seek, as well as data which fall outside the scope of your request. Regrettably, the Treasury Department must deny your request for the information you seek.

Two exemptions in the Freedom of Information Act are applicable:

(1) 5 U.S.C. 552 (b)(3) provides that the disclosure provisions of the Act do not apply to "matters that are in especially exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." As you are aware, the International Investment Survey Act and the Bretton Woods Agreements Act preclude Treasury from disclosing the information you seek. In the package of material sent to you on April 6, 1981, you will find an opinion from Russell Munk, Assistant General Counsel for International Affairs, which explains the legal basis for this conclusion. The information you seek is thus exempt from disclosure under the Freedom of Information Act. [31 CFR section 1.2(c)(iii)]

(2) 5 U.S.C. 552(b)(1) provides that the disclosure provisions of the Act do not apply to "matters that are specifically authorized under criteria established by an

Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." The information you seek is in a document that is classified "confidential," in accordance with Executive Order, and is specifically authorized to be kept secret in the interest of national defense or foreign policy. Under this provision, the information you seek is exempt from disclosure under the Freedom of Information Act. [31 CFR section 1.2 (c)(i)(a)].

Within thirty-five days after the date of this letter, you may submit an administrative appeal of this denial pursuant to 31 CFR section 1.5(h). The appeal should be addressed to:

Freedom of Information Appeal
U.S. Department of the Treasury
1500 Pennsylvania Ave., N.W.
Washington, DC 20220

Attached is an excerpt of the pertinent Treasury Regulations. The office referred to in section (h)(2) is the Assistant Secretary for International Affairs.

Sincerely yours,

/s/ Thomas Leddy
Thomas B. Leddy

Will Maslow, Esq.
American Jewish Congress
15 East 84th Street
New York, New York 10028
cc: √ Marc Stern, Esq., American Jewish Congress

[LETTERHEAD OF]

AMERICAN JEWISH CONGRESS
Stephen Wise Congress House
154 East 84th Street
New York, N.Y. 10028
(212) 879-4500

COMMISSION ON LAW AND SOCIAL ACTION

May 22, 1981

Freedom of Information Appeal
United States Department of the Treasury
1500 Pennsylvania Avenue
Washington, D.C. 20220

Re: 81-03-39

To Whom It May Concern:

The American Jewish Congress hereby appeals from the denial of its request, pursuant to the Freedom of Information Act, 5 U.S.C. 552, for the production of certain documents detailing certain investments held by foreign persons [as defined in 22 U.S.C. § 3102(3)] from Saudi Arabia, Kuwait and the United Arab Emirates. A copy of Thomas B. Leddy's letter denying our request is enclosed.

We have sought this information solely in order to inform the public about the magnitude and forms of investment held by persons from these countries. We do not seek to identify any particular investor, or embarrass the Government of the United States in its dealings with the governments of these countries. To this end, we are willing to discuss with officials of the Treasury Depart-

ment whether there is not some way in which our needs can be satisfied without impinging on the interests Treasury seeks to protect.

The Department of the Treasury, in a letter to Will Maslow dated May 8, 1981 has denied that request on two grounds. It first contends that withholding of the information sought is authorized by Section 552(b)(3), which authorizes such action where a statute requires that the information be withheld from the public. In this case, the Department cites 22 U.S.C. § 3104(c) as forbidding public disclosure of information collected under the International Investment Survey Act.

That section provides, in relevant part, that information collected under the International Investment Survey Act, 22 U.S.C. §§ 3101 *et seq.*, may not be "publish[ed] or ma[d]e available in a manner that the perosn who furnished the information can be specifically identified." AJCongress does not seek the disclosure of, nor does it have any interest in learning, the government's sources of information. Rather, it seeks, in aggregate form, the total investments of all "persons"--governmental and private —from the enumerated countries. On its face, then, 22 U.S.C. § 3104(c) does not justify withholding the information sought.

Treasury also cites 22 U.S.C. § 286f(a) which provides that information collected under the Bretton Woods Act, 22 U.S.C. §§ 286 *et seq.*, may not be disclosed "in such detail that the affairs of any person are disclosed," as authority for withholding the information requested by AJCongress. Again, as noted, we do not seek disclosure

of the details of any particular individual's investments, even if the person happens to be a government.

Treasury's decision not to disclose the information requested is particularly surprising since the International Investment Survey Act contemplates disclosure to the general public [22 U.S.C. §§ 3101(b) and 3103(a)(4)] of the information collected pursuant to 22 U.S.C. § 3103(b) and (c). The information required to be collected and disseminated under the Act includes the "magnitude and aggregate value of portfolio investments, . . . forms of investment, nationality of investors . . . (22 U.S.C.(c)(1) —precisely the information sought by AJCongress. Indeed, Treasury apparently agrees, for it publishes this type of information on a country by country basis for all but the OPEC countries—disclosures that in Treasury's view are illegal and which subject Treasury officials to criminal penalties.

The second ground proffered by Treasury for withholding is the classified information exemption of the Freedom of Information Act. By its express terms, that exemption applies only to matters properly classified. In view of the fact that the International Investments Survey Act *requires* the disclosure of the information sought, we are unable to discern any legitimate basis for invoking this exemption, particularly since the basis for classifying the information is not disclosed.

We note as well that the Department of the Treasury has never before suggested that the information sought is classified. Thus, when the House Subcommittee on Domestic and International Scientific Planning, Analysis and Co-

operation requested the information sought here, Treasury denied the request solely on the ground that the statute precluded disclosure, but not on the ground of "state secrets." It likewise made no such claim in response to a GAO report "Are OPEC Financial Holdings a Danger to U.S. Banks or the Economy," EMD 79-45, calling for the disclosure of the information sought here.

Finally, Treasury has repeatedly claimed that the disclosure would harm the domestic economy because the Saudis would no longer invest in this country. This fear may or may not be real, but it surely reveals that the materials are not being withheld for national security or foreign policy reasons.

In short, Treasury's classification argument (even if the document is in fact classified) is little more than a recent invention, designed to impede disclosure.

For these reasons, the material sought should be released.

Sincerely,

/s/ Marc D. Stern
Marc D. Stern

MDS: jcp

[LETTERHEAD OF]

DEPARTMENT OF THE TREASURY
Washington, D.C. 2020

ASSISTANT SECRETARY

June 25, 1981

Dear Mr. Stern:

This is a reply to your letter of May 22, 1981 in which the American Jewish Congress appealed from the denial of its request for certain documents detailing certain investments held by foreign persons from Saudi Arabia, Kuwait and the United Arab Emirates.

I am responding because I am the Assistant Secretary of the Treasury for the offices having principal custody of the documents in question, and, under Treasury Regulations, am responsible for appeals under the Freedom of Information Act.

I have reviewed your appeal in the light of the original denial by Thomas Leddy, and in the light of Public Law 94-472, the International Investment Survey Act of 1976, which provides the legal basis for collecting, disseminating and safeguarding the information which you seek.

My basic approach is to provide to any interested party as much information as he requests, within the limits of the legislation which governs such disclosures. In this case, unfortunately, I must deny your appeal of the original request for information.

I do so both on the grounds already cited by Mr. Leddy in his letter to Mr. Maslow of May 8, 1981 (attached), which

I have reviewed and find compelling, but also on other grounds which I find even more conclusive.

As you are aware, Section 5, (c), (2) of the Act in question states:

> . . . No person can compel the submission or disclosure of any report or constituent part thereof collected pursuant to this Act, or any copy of such report or constituent part thereof, without the prior written consent of the person who maintained or furnished such report under subsection (b) and without prior written consent of the customer, where the person who maintained or furnished such report included information identifiable as being derived from the records of such customer.

Your request deals with:

1. The amount of monies on deposit in U.S. banks in the United States; and

2. The amounts of Treasury bills
owned by nationals of the three countries in question.

The information which the Treasury Department has collected dealing with bank deposits and Treasury bills was collected pursuant to regulations which we have issued in accordance with the provisions of PL 94-472. We could not release this information therefore, if the disclosure includes information *identifiable as being derived from the records* of a bank customer, without the written permission of that customer.

We have reviewed the information which you seek, and I find that:

1. The percentage of the U.S. bank deposits and Treasury bills held by a single customer in each of the three countries is so high that any publication of these data would be considered a disclosure of the positions of these single customers. This would preclude us from releasing this information without the written consent of the customers involved.

2. In its normal day-to-day international business, the Treasury Department has occasion to deal with representatives of the customers in question in each of the countries which you cite. We know as a fact that none of these customers would agree to release this information to anyone, since they value confidentiality and privacy concerning their financial situation very highly. There is absolutely no possibility of their being willing to authorize release of this information to anyone.

For the above reasons, therefore, your appeal of Mr. Leddy's decision is hereby denied. This letter constitutes a final denial of your request by the Department of the Treasury. Pursuant to 5 U.S.C. §552(a)(4), you may seek judicial review of this decision in the United States District Court in the district in which you reside, in which your principal place of business is located, in which the records are located, or in the District of Columbia.

Sincerely yours,

/s/ Marc E. Leland
Marc E. Leland

Mr. Marc Stern
American Jewish Congress
15 West 84th Street
New York, N. Y. 10028

Attachment

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Affidavits Submitted by the Department of the Treasury in Support of Its Motion for Summary Judgment

Affidavits Submitted by the Department of the Treasury

Affidavit of C. Dirck Keyser

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1745

AMERICAN JEWISH CONGRESS,

Plaintiff

v.

UNITED STATES DEPARTMENT OF THE TREASURY,

Defendant

I have been the Director of the Office of International Financial Reports (IRI) since 1976. It is a part of the Office of the Assistant Secretary of International Affairs, Department of the Tresaury. I was Deputy Director of IRI during 1975. This office is responsible for preparing statistical reports and analyses in connection with the Treasury Department's ongoing program of collecting data on portfolio investment in the United States by foreigners, pursuant to Part 128 of the Treasury Department regulations in 31 C.F.R.

The Treasury Department has rigorous rules to prevent disclosure of any data collected by IRI which would reveal the holdings of a particular investor. These rules have been so effective that no government has protested

that publication of "country aggregates" in the monthly *Treasury Bulletin* has disclosed the holdings of that government. ("Country aggregates" for Middle East and African oil exporting countries are not provided to the International Monetary Fund.)

Among other reports, this office periodically prepares a table showing "Estimated Outstanding Portfolio Investment in the United States of Oil-Exporting Countries" as of particular dates. These data have been classified "CONFIDENTIAL" since their inception in 1974.

For Assistant Secretary Bergsten's testimony in 1979, and in recent months, my office has done statistical analyses to determine what percentage of total portfolio holdings or particular types of investment for Saudi Arabia, Kuwait, and the United Arab Emirates is held by official (government) institutions. A table reflecting such analysis for Middle East oil exporters was provided to the House of Representatives in 1979; a copy is attached to the memorandum supporting the motion for summary judgment. Recent analyses show that total holdings of Treasury bills by government institutions are a very high percentage of total holdings of Treasury bills by all residents of each of Saudi Arabia, Kuwait, and the United Arab Emirates; and in two of these three countries, total holdings of bank deposits by government institutions are a high percentage of total holdings of bank deposits by all residents of these countries. Information available to me also indicates that, for each of the three countries, an extremely high percentage of portfolio investment by official institutions is held by particular financial or monetary authorities in each of those countries.

Affidavits Submitted by the Department of the Treasury

On April 22, 1981, in connection with a Freedom of Information Act request from the American Jewish Congress, I forwarded to the General Counsel's office the most recent table titled "Estimated Outstanding Portfolio Investment in the United States of Oil-Exporting Countries as of Year-End 1980". That table was provided to the General Counsel's office on an "expurgated" basis, without showing details of "country aggregates" for the Middle East oil exporting countries. A copy of that table and the covering memorandum is attached to the memorandum supporting the motion for summary judgment.

That table was prepared in February, 1981. On my instructions it was classified "CONFIDENTIAL" on February 2, 1981, stamped with IRI's classification stamp, and marked with a declassification date.

The table in question, and others like it, have been classified "CONFIDENTIAL" because disclosure of the "country aggregates" for particular types of investment by each of Saudi Arabia, Kuwait, and the United Arab Emirates could cause identifiable damage to the foreign relations of the United States. By decision of September 8, 1978, Assistant Secretary Brill determined that the documents should continue to be so classified.

The governments in question have on numerous occasions expressed their concern that their investments in the United States be held confidential. The Treasury Department, in part relying on statutory provisions preventing disclosure, has made clear to the governments of the countries concerned, as well as to others, that the confidentiality of their investments in the United States will be maintained and continued. The governments in question have

relied on those assurances, as have others. Disclosing the information in question would be a breach of faith by the United States which would not only harm our foreign relations with the countries in question, but could cast doubt on the credibility of our undertakings vis-a-vis other countries.

Even if the Treasury Department had not assured the countries in question that information about their holdings in the U.S. would be kept confidential, the information in question would be properly classified. That information basically would disclose where certain governments decided to place their very substantial surpluses. Information about the holdings of foreign central banks and monetary authorities is commonly held in the strictest confidence. Disclosing information about those holdings would not only affect our relations with the countries involved, but might also lead other countries to question whether their holdings will be held in confidence; our relations with those other countries also could be adversely affected.

/s/ C. Dirck Keyser

September 21, 1981

Sworn and subscribed to before me this 21st day of September, 1981 in the District of Columbia.

/s/ Alice K. Tambellini

Alice K. Tambellini
Notary Public
My Commission Expires May 31, 1982

Affidavits Submitted by the Department of the Treasury

Affidavit of Marc E. Leland

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1745

AMERICAN JEWISH CONGRESS,

Plaintiff

v.

UNITED STATES DEPARTMENT OF THE TREASURY,

Defendant

I am, and since May 4, 1981, have been Assistant Secretary for International Affairs of the Department of the Treasury. Among my duties is the supervision of the Office of International Financial Reports, which is responsible for preparing statistical reports and analyses in connection with the Treasury Department's ongoing program of collecting data on portfolio investment in the United States by foreigners, pursuant to Part 128 of the Treasury Department regulations in 31 C.F.R.

I have reviewed the Affidavit of C. Dirck Keyser, attached hereto, and am of the view that Mr. Keyser has correctly classified as "CONFIDENTIAL" the detailed data on the portfolio investments in the U.S. of particular Middle East oil exporting countries. I concur in Mr. Keyser's reasons for so classifying that data.

In addition, I would note that the decisions by countries about where to hold reserves or surpluses, particularly in respect of countries with large surpluses, can be viewed as in part "political" decisions, with possible "political" ramifications both in the domestic politics of the country in question, and world-wide. There is considerable risk of those political ramifications should Treasury release the information in question. Those political ramifications could cause "identifiable damage" to the foreign policy of the United States in respect of these countries.

Since assuming office, I have had conversations with officials of Saudi Arabia, and have read a recent report of conversations between U.S. government officials and an official of the United Arab Emirates. These officials confirmed that their governments wish that information about their investments in the United States be held in strictest confidence.

October 1, 1981

/s/ MARC E. LELAND

Marc E. Leland
Assistant Secretary
for International Affairs

DISTRICT OF COLUMBIA) ss:

Subscribed and sworn to before me this 1st day of October, 1981.

/s/ G. GEORGE SHAVER

Notary Public, D.C.
My Commission Expires January 1, 1982

Affidavits Submitted by the Department of the Treasury

Affidavit of Ralph Edwin Bresler

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1745

AMERICAN JEWISH CONGRESS,

Plaintiff

v.

UNITED STATES DEPARTMENT OF THE TREASURY,

Defendant

I am presently country officer for Kuwait and Oman at the Department of State, and, during the period August, 1979, to July, 1981, I was Chief of the Economic Section at the American Embassy in Kuwait.

Based on discussions I have had with Kuwaiti officials in charge of their investments overseas, I understand that the Government of Kuwait wishes the total amounts of, and details about, its investments in the United States held in confidence.

/s/ RALPH EDWIN BRESLER

September 10, 1981

District of Columbia: ss:
Subscribed and sworn before me
this 10th day of September 1981
/s/ LOUISE P. STURGEON
Notary Public
My Commission Expires April 30, 1985

Affidavits Submitted by the Department of the Treasury

Affidavit of C. Dirck Keyser

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1745

AMERICAN JEWISH CONGRESS,

Plaintiff

v.

UNITED STATES DEPARTMENT OF THE TREASURY,

Defendant

1. Pursuant to OASIA Circular No. 80-1, excerpts of which are attached, I have been authorized to classify national security information as "CONFIDENTIAL".

2. In my earlier affidavit, I explained in as much detail as I could, without making disclosures which could reasonably be expected to damage the national security, the reasons for classifying Exhibit A to Defendant's Motion for Summary Judgment. Further specifying the "damage" that could reasonably be expected to occur would, in my judgment, damage the national security.

3. Based on facts stated in the fourth paragraph of my affidavit of September 21, 1981, I concluded and still believe,

in respect of the information sought by the American Jewish Congress, that disclosure by country of aggregates of portfolio holdings of all residents of Saudi Arabia, Kuwait, and the United Arab Emirates would disclose the holdings of particular monetary or financial authorities in each of these countries.

/s/ C. Dirck Keyser

Sworn and subscribed to before me this 15th day of December in the District of Columbia.

/s/ Alice K. Tambellini

Notary Public
My Commission Expires May 31, 1982

Affidavits Submitted by the Department of the Treasury

Affidavit of Charles Schotta

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1745

AMERICAN JEWISH CONGRESS,

Plaintiff

vs.

UNITED STATES DEPARTMENT OF THE TREASURY,

Defendant

I, Charles Schotta, hereby declare and say as follows:

1. Since May, 1979, I have been Deputy Assistant Secretary of the Treasury (Commodities and Natural Resources) in the Office of the Assistant Secretary for International Affairs ("OASIA") of the Department of the Treasury. Among other things, I currently supervise the Office of Saudi Arabian Affairs and the Office of International Financial Reports. Before becoming Deputy Assistant Secretary, I was the Director of the Office of International Energy Policy during 1977-1979, the Director of the Office of Energy Policy Analysis during 1975-1977, and Director of the Office of International Financial

Analysis during 1973-1975. (All of these offices were part of OASIA.)

2. In this affidavit, I wish to confirm and amplify the reasons, as much as I can consistent with the requirements of national security, for Treasury's decision to classify as "CONFIDENTIAL" under Executive Order 12065 the table requested by the American Jewish Congress in connection with their Freedom of Information Act request. Further specifying on the public record the reasons for classifying that table would, in my judgment, cause identifiable harm to the national security, contrary to Executive Order 12065.

3. It is my judgment that harm to the national security may be reasonably expected to result from making the requested table public. This is principally because, if the data in question are released, the United States Government will have demonstrated to the governments of three Middle East oil exporting countries, Saudi Arabia, Kuwait and the United Arab Emirates, that it is unable or unwilling to maintain its commitments and uphold the usual standards of international practice with respect to financial confidentiality.

4. In my office director capacities and as a deputy assistant secretary in OASIA, I have had extensive official contacts with financial officials of the governments of Saudi Arabia, Kuwait and the United Arab Emirates, including their central banking agencies. Most recently, this year I was in Saudi Arabia on January 16-22, in Kuwait on Jan-

uary 24-25 and in the United Arab Emirates on January 26. In Saudi Arabia, I met with the Governor, Vice Governor, Senior Advisors and other officials of the Saudi Arabia Monetary Agency; the Deputy Minister of Commerce and officials in the Ministry of Finance. In Kuwait, I met with the Oil Minister, the Governor of the Central Bank, the Chairman of the Economic and Financial Committee of the National Assembly and the Chairman of the Board of Directors of the National Bank of Kuwait. In the United Arab Emirates, I met with an advisor to the Central Bank, the Director of the Investment Department of the Ministry of Finance, the Director General for Political Affairs of the Ministry of Foreign Affairs and the Minister of Planning.

5. Officials of each of these three countries have emphatically and directly expressed to me, as well as to other officials of the Treasury Department, including the Secretary of the Treasury, their great concern that data about the official investments of their countries in the United States might be released to the public. These officials are well aware of, and very much concerned about, the repeated Congressional requests for data, on a country-by-country basis, for Middle East OPEC country investments in the United States. Portions of these data, which have not been furnished to the Congress, are the subject of the American Jewish Congress' Freedom of Information Act request. For each of the three countries in question, official investments are a high percentage of the total investments of that country in the United States. This fact is widely known, and representatives of each of these three countries have personally communicated to me that their governments ob-

ject to a release of country-by-country data with respect to portfolio investments from their countries in the United States. Disclosure of such information could therefore be expected to greatly impair our foreign relations with these, and perhaps other, foreign nations.

6. It is my understanding that United States law (more specifically, the International Investment Survey Act of 1976) and customary international practice require central banking data to be kept confidential. Whenever I have heard officials of the three countries in question express their concerns about the release of country-by-country investment data, they have been assured that the United States Government would continue to protect the confidentiality of these data and would continue its current practice, which is to publish area aggregates rather than individual country aggregates with respect to their investments.

7. I wish to dispel some confusion about the reasons the Treasury Department has classified the table in question. The American Jewish Congress, in particular, has asserted that Treasury's reasons for classifying the table in question relate not to protecting the national security, but to protecting the domestic economy.

8. I believe it is imperative to be clear that Treasury is not basing its classification decision principally on the potential harm that could occur to the domestic U.S. economy. I recognize that there are circumstances where potential harm to the domestic economy could threaten our national security; but the principal reason for classfying the

table in question does not relate to harm to the domestic economy.

9. It is the Department's view that, even if the Middle East countries in question were to withdraw their investments from the United States, the act of withdrawal would not of itself cause grave harm to the United States domestic economy. First, OPEC investments, while large in absolute terms, are a small share of foreign investment in the United States, and an extremely small share of all investment, domestic and foreign, in this country. Second, even if the Middle East OPEC countries were to withdraw their assets from U.S. financial institutions, they would have to place their funds in non-U.S. financial institutions; and the international capital markets are so well developed that the funds in question could well find their way back to the United States. Non-U.S. financial institutions holding those "withdrawn" deposits would likely seek to place them with other institutions, including banks in the United States. Finally, we have ample defenses to deal with with any consequences for the capital market that could be caused by a withdrawal of the holdings of Middle East OPEC members. In short, in the view of this and prior Administrations, the consequences for the national economy that might occur by virtue of a withdrawal of funds are manageable, though there would be economic costs.

10. Confidence between governments and central banks remains a vital factor in the conduct of international financial affairs. As recently as January of this year, I was told by an official of the Saudi Arabian Government that a de-

cisive factor guiding official Saudi investment in foreign currencies, including the U.S. dollar, is confidence in the government of the country where that investment is made. Four successive Secretaries of the Treasury have concluded that disclosure of the individual country data, particularly in the face of the expressed wishes of the countries involved, would result in damage to our relations with these countries, which in turn could trigger adverse consequences for the United States and the world economy.

11. A withdrawal of funds directly placed in the United States, precipitated by a breach of confidence by the United States Government, would undermine the close ties with foreign governments and monetary authorities presently characterizing international financial relations. We consider these relations vital to maintaining the stability, openness and smooth functioning of the international financial system. These foreign relations responsibilities are clearly within the purview of the Secretary of the Treasury, in pursuing policies that will encourage the open and stable international capital markets essential to sustain worldwide economic growth.

12. Moreover, the decisions about where to hold reserves or surpluses, particularly in respect of countries with large surpluses, can be viewed as in part "political" decisions, with possible "political" (as well as economic or financial) ramifications, both in the domestic politics of the country in question, and world-wide. Officials at the Treasury Department, including myself, review classified data from various sources, and believe that there is a risk of adverse political consequences should Treasury release the

information in question. Thus, "identifiable damage" to the foreign relations of the United States in respect of these countries, and possibly in respect of other countries, could occur.

13. Deterioration of relations with the Middle East oil-exporting countries arising from disclosure of their investments could also be manifested in other decisions of an economic or political nature concerning such vital matters as trade, security in the Middle East and economic assistance to developing countries. I am also today signing a classified affidavit, for the Court's *in camera* inspection, describing in more detail the damage to the national security of the United States, stemming from such other decisions of an economic or political nature that could be taken by one or more of the three countries in response to public disclosure of the data sought by the American Jewish Congress. That classified affidavit also indicates in some detail the harm such disclosure could cause to the ability of the U.S. Government to monitor foreign investment in the United States.
March 26, 1982

/s/ Charles Schotta

Charles Schotta
Deputy Assistant Secretary
(Commodities and Natural Resources)

Sworn and subscribed to before me this 26th day of March 1982 in the District of Columbia.

/s/ Alice K. Tambellini

Notary Public
My Commission Expires May 31, 1982

Affidavits Submitted by the Department of the Treasury

Consolidated Supplemental Affidavit of C. Dirck Keyser

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-1745

AMERICAN JEWISH CONGRESS,

Plaintiff

v.

UNITED STATES DEPARTMENT OF THE TREASURY,

Defendant

I, C. Dirck Keyser, hereby declare and say as follows:

1. I am the Director, Office of International Financial Reports, Office of the Assistant Secretary for International Affairs, U.S. Department of the Treasury. The matters stated herein are based upon my personal knowledge and upon my personal review and consideration of information available to me in my official capacity.

2. This affidavit addresses matters pertinent to the decision not to disclose the "country aggregates" of certain portfolio holdings of Saudi Arabia, Kuwait and the United Arab Emirates, sought by the American Jewish Congress in their Freedom of Information Act request. One of the matters involves the statistical analysis of whether disclosure of country aggregates would be tanta-

mount to disclosing the holdings of a particular investor; that analysis relates to the decision not to disclose pursuant to 5 U.S.C. §552(b)(3). A later portion of this affidavit addresses information classified and withheld from disclosure pursuant to 5 U.S.C. §552(b)(1).

3. I have been the Director of the Office of International Financial Reports since 1976, and was Deputy Director of the office during 1975.

4. The Office of International Financial Reports is responsible for preparing statistical reports and analyses in connection with the Treasury Department's ongoing program of collecting data on portfolio investment in the United States by foreign residents, pursuant to the International Investment Survey Act of 1976 ("Survey Act"), 22 U.S.C. § 3101 *et seq.*, the Bretton Woods Agreements Act, 22 U.S.C. § 286f, and Part 128 of the Treasury Department regulations in 31 C.F.R. Portfolio investment is defined in the Survey Act to mean, in effect, all international investment involving the "ownership or control, directly or indirectly, by one person of" less than 10% "of the voting securities or an incorporated business enterprise or an equivalent interest in an unincorporated business enterprise". (22 U.S.C. 3102 (10), (11)) Portfolio investment data collected on Treasury's International Capital report forms include bank deposits and Treasury bills, the two types of portfolio investment which are the subject of the FOIA request of the American Jewish Congress. (The Commerce Department has responsibility under the Survey Act for gathering and publishing information about foreign

direct investment, including investment in U.S. real estate. See Executive Order 11961, 42 F.R. 4321. The Department of Agriculture administers the Agricultural Foreign Investment Disclosure Act of 1979 (7 U.S.C. § 3501, *et seq.*), which requires reporting of foreign persons holding, acquiring or transferring any interest in U.S. agricultural, timber or forestry land.)

5. Since 1934, the Treasury Department, using forms which have indicated that the data furnished will "be held in confidence," has collected data on the liabilities of U.S. institutions to "foreigners". Those "liabilities" include holdings of bank deposits and Treasury bills. The present report forms generally separately identify portfolio holdings of several broad categories of "foreigners," including "foreign official institutions," "unaffiliated foreign banks," and "all other foreigners"; those "foreigners," for purposes of this affidavit, are bank customers ("customers"). The banks and other reporters furnishing the information ("reporters") are not asked to describe the holdings of particular government institutions or customers. The report forms are submitted to a Federal Reserve bank, where they are then coded into a computer system. By agreement with the various Federal Reserve Banks and the Board of Governors of the Federal Reserve System, the Treasury Department retains control over the data from the reports. It uses these data in the preparation of both public and non-public compilations. The "confidentiality" provisions of the forms address "confidentiality" for the "reporters," which furnish completed forms to pertinent Federal Reserve Banks, and for the reporters' customers.

6. Since 1935 (except during World War II) the Treasury Department has published extensive and detailed tables summarizing the data it has collected. The publication of these data is designed to provide the fullest possible information to the public, and was and is more extensive than that of other countries. The first tables published in 1935, thus, show short-term liabilities of U.S. banks to "foreigners," including "country aggregates" for seven European countries and Canada, as well as holdings broken down into specified "regions". Through the years, the Treasury Department has published "country aggregates" for a good many countries.

7. At present my office provides data which are, among other things, the basis for of a table showing "Liabilities to Foreigners Reported by Banks in the United States: Table CM-I-3, Total Liabilities by Country" published monthly in the *Treasury Bulletin*. This table shows, among other things, aggregate portfolio holdings in banks in the United States of oil exporting countries in Africa and oil exporting countries in Asia, but does not show specific "country aggregates" for the oil-exporting countries in the Middle East (or in Africa). This table indicates in a footnote that the oil-exporting countries in Asia include Bahrain, Iran, Iraq, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates, which are the Middle East oil exporting countries in question. Specifically, the data on the table are the sum of Treasury bills held by and commercial bank liabilities to residents of individual countries or geographic areas. Exhibit 1 to this affidavit contains this table as it appears in the copy of the *Treasury Bulletin*

furnished the American Jewish Congress in connection with their FOIA request. This table indicates that at the end of December, 1980, liabilities reported by banks to oil exporting countries listed in "Asia" were $14,476 million.

8. While the Treasury Department does not publish the holdings of individual Middle East oil exporting countries, the Department has published considerable data about the *total* holdings of these countries combined. In the monthly *Treasury Bulletin*, the Department publishes tables describing total U.S. bank and non-bank liabilities to these countries. The *Bulletin* also publishes total liabilities *by type*, including short-term Treasury obligations (*i.e.*, Treasury bills and certificates) and demand and time deposits—the data sought by the American Jewish Congress.

9. In 1979, in connection with former Assistant Secretary Bergsten's testimony before the Subcommittee on Commerce, Consumer and Monetary Affairs of the House Government Operations Committee, Treasury made public a table describing U.S. Treasury securities held by, and total commercial bank liabilities to, Middle East OPEC members plus Bahrain and Oman. (A copy of the testimony is Exhibit 2 hereto. The table is table 3 at the end of the testimony.) A more detailed table was made public in 1981 in connection with the testimony of Assistant Secretary Leland before the same Subcommittee. (A copy of Mr. Leland's testimony is Exhibit 3 hereto. The table is on page 12 of the Annex to this testimony.) It contained data for the end of 1980 which show separately the holdings of Treasury bills and certificates, and commercial bank lia-

bilities to these countries, which together total the figure published in CM-I-3 in the *Treasury Bulletin* furnished the American Jewish Congress (Exhibit 4).

10. In 1980 Treasury published findings from a comprehensive "benchmark" survey of portfolio investment in the United States, including a table showing the amounts of Treasury bonds and notes and other securities held by oil exporting countries. This benchmark study was conducted pursuant to the International Investment Survey Act of 1976.

11. Senior officials of the Department have also testified about the aggregate amounts of portfolio investment held by Middle East countries, and have explained why these holdings do not have major negative implications for the U.S. national interest. (See Exhibits 2 and 3.)

12. Prior to and during 1974, the Treasury Department did publish "country aggregates" describing the short-term liabilities of U.S. banks to Saudi Arabia, Kuwait, and other Middle East oil exporting countries. The supporting data were collected twice a year, rather than monthly.

13. When the oil price was quadrupled in 1974, the OPEC countries began to accumulate large payment surpluses. The disposition of those surpluses became a matter of major importance not only to the surplus countries themselves but also to the entire world.

14. The governments in those countries had available several alternative ways of holding or investing those sur-

pluses, other than holding them in dollars in the United States. The Eurodollar market had developed, and surpluses could be deposited in dollar accounts in commercial banks outside the United States. Countries had also begun to hold foreign exchange reserves in currencies other than the U.S. dollar, and in forms other than bank deposits or securities issued by the U.S. and other national authorities. Because these alternatives were available, decisions as to the currency or form in which reserves or surpluses were held, and the location of the holdings, could be perceived as at least in part "political," and could have international *political* (as well as economic) ramifications.

15. To obtain more detailed information about these surpluses, in 1974 Treasury found it necessary to make significant changes in its reporting systems with regard to the portfolio transactions of the Mid-East oil exporting countries. Treasury felt it advisable to change the reporting instructions to require monthly reports and to cover the whole range of portfolio transactions by residents of these countries.

16. Information available in Treasury indicated clearly at the time that the official monetary authorities did in fact hold a very high percentage of the total portfolio investments in the United States of residents of those countries.

17. To have continued the previous practice of publishing an individual country breakdown would have effectively disclosed holdings of individual official institutions. Thus, it became necessary to group countries in order to

maintain confidentiality, as requested by some of the countries involved.

18. The Treasury Department thus first published aggregates of portfolio holdings for all Middle East oil exporting countries combined, rather than individual "country aggregates," in January, 1975. Just prior to that date, Congress debated, in the summer and fall of 1974, the bill that became the Foreign Investment Study Act (15 U.S.C. 78b note) on October 20, 1974. Subsequently, at a time when Treasury continued to publish aggregates of portfolio holdings for all Middle East oil exporting countries combined, rather than particular "country aggregates," Congress enacted the Survey Act. To my knowledge, confirmed by a search of my files, during the period 1975-77 Treasury's practice of publicly aggregating portfolio holdings of all Middle East oil exporting countries was not questioned by anyone either in or out of the Department.

19. During the entire time I have been employed at the Treasury Department, the Department has believed itself constrained by law from publishing data which would reveal the portfolio holdings of a particular investor. The Treasury Department has been mindful of the statutory restrictions on inter-agency disclosure, which provide (*inter alia*) that "(a)ccess to information obtained under . . . (the Act) shall be available only to officials or employees designated to perform official functions under this chapter. . . ." 22 U.S.C. 3104(c) The Treasury Department, thus, has not disclosed separate "country aggregates" for portfolio

holdings of Kuwait, Saudi Arabia, and the United Arab Emirates to the Congress, even on a "confidential" basis, despite requests by Congressional committees for access to that information.

20. Prior to employment at the Treasury Department, I was Director, Research and Policy Division, Office of Foreign Direct Investments, U.S. Department of Commerce, from April, 1970 to June, 1974.

21. Both in the Commerce Department and the Treasury Department, I have been responsible for preparing statistical reports, and am familiar with the principles of disclosure analysis and the techniques of disclosure-avoidance. Those topics have been the subject of a public inter-agency "Report on Statistical Disclosure and Disclosure-Avoidance Techniques" ("Report"), (Exhibit 5.)

22. The principles of disclosure analysis in general identify the circumstances when publication of data, like the "country aggregates" sought by the American Jewish Congress, is tantamount to disclosure of data or information about a particular customer. The principles take into account the fact that the public has general knowledge or other information about a particular subject, which could be brought to bear in an analysis of data made public (Report, p. 14). They also take into account the number of persons about whom information is provided (Report, p. 13).

23. Thus, as an example, if aggregated data contain information about only two persons, publication of the data

would disclose information about one person to the other, because each would know its own information, and would be able to deduce information provided by the other. Again as an example, if data contained information overwhelmingly about a single person, publication *would* disclose that information if it were known, from any source, that the information provided by that person was an overwhelming proportion of those data.

24. The principles of disclosure analysis are the response of statisticians to legal requirements, such as those of the Survey Act, that data not be released in a manner that would reveal information about particular respondents or their customers. Those principles seek to strike a balance between making as much information as possible available to the public, and withholding information which can be associated with a particular person (Report, Chapter V). These statistical principles are accepted within the U.S. Government, and applied by many agencies in many contexts. Similar principles are followed by other governments.

25. Two statistical principles are important with respect to the request of the American Jewish Congress for country aggregates. First, when a significant proportion (more than a majority) of the data is reported by a single reporter or related to a single customer, publication of the data could reveal information about that reporter or customer. Second, when an overwhelming proportion of the data are those of two reporters or of two customers, publication of the data could be tantamount to disclosure of information of a reporter or a customer.

26. The Census Bureau has applied these principles. It has expressed the latter of these principles in technical language, and explained the reasons why it is not more precise in stating particular "percentages":

> A dominance rule is employed in identifying sensitive cells: regardless of the number of respondents in the cell, if a small number (n or fewer) of these respondents contribute a large percentage ($k\%$ or greater) of the total cell value, then the cell is considered sensitive and is suppressed. The values of n and k are not revealed by the Bureau, since that publication would allow closer estimation of suppressed values, and would in turn require more suppression (Report, p. 46).

27. The Treasury Department has had occasion to seek Bureau of Census confirmation of statistical principles similar to those applied with respect to the "country aggregates" in question. In establishing a new statistical system in the Treasury Department (the Treasury Foreign Currency Reporting System) during 1974 and 1975, my office (then known as the Office of Statistical Reports) reviewed its disclosure rules with the Office of Management and Budget ("OMB"). We were told by OMB that the best authority on the subject of disclosure policy was the Bureau of the Census, with whom we were urged to consult. Census, in order to protect the confidentiality of the firms and individuals reporting to that Bureau, was unwilling to spell out its criteria, because knowledge of these criteria would facilitate identification of the data of individual reporters. Our office was told, however, that Census would review our proposed criteria and give us an opinion as to

whether these criteria were adequate. We explained our proposed criteria, and were advised that following these criteria would indeed provide the protection desired.

28. I have been guided by these principles both in the Department of Commerce and in the Department of the Treasury since 1970.

29. In light of these principles, the Treasury Department has published geographic area totals of portfolio investment for the Middle East and African oil exporting countries since January, 1975. Publication of these geographic area totals, rather than individual country totals, has permitted the Treasury Department to make a wide range of investment information available to the public on a monthly basis, without disclosing the holdings of a particular investor. We have applied these principles so effectively that no government or other customer has protested that publication of "country aggregates" in the monthly *Treasury Bulletin* has disclosed the holdings of that investor. "Country aggregates" for Middle East and African oil-exporting countries are not provided to the International Monetary Fund for the reasons set out above.

30. For Assistant Secretary Bergsten's testimony in 1979, and in recent months, my office has done statistical analyses to determine what percentage of total portfolio holdings of particular types of investment for Saudi Arabia, Kuwait, and the United Arab Emirates are held by official (government) institutions. A table reflecting such analysis for Middle East oil exporters was provided to the Subcom-

mittee on Commerce, Consumer and Monetary Affairs of the House Committee on Government Operations in 1979; a copy is attached as Exhibit 6. Recent analysis of the data requested by the American Jewish Congress show that total commercial bank liabilities to government institutions are a very high percentage of such liabilities to all residents of each of Saudi Arabia, Kuwait, and the United Arab Emirates; and in two of those three countries, total holdings of bank deposits by government institutions are a high percentage of total holdings of bank deposits by all residents of these countries.

31. Information available to the general public and to me indicates that particular official financial or monetary authorities in each of these countries hold an extremely high percentage of total foreign portfolio investment by all investors in these countries.

32. In my judgment, in view of these facts, and the widely accepted disclosure principles described above, publication by country of the "aggregates" of portfolio holdings of Kuwait, Saudi Arabia and the United Arab Emirates sought by the American Jewish Congress would be tantamount to disclosure of the holdings in the United States of particular official monetary or financial authorities in each of these countries. I have been advised by lawyers in the Treasury Department that, once I have made such a judgment, I have no discretion to publish such data, because publication would be contrary to the International Investment Survey Act of 1976.

33. Among other reports, this office from time to time prepares a table showing "Estimated Outstanding Portfolio Investment in the United States of Oil-Exporting Countries" as of particular dates. The data in each of these tables for Middle East and African oil exporting countries have been classified "CONFIDENTIAL" under Executive Order 12065 and predecessor orders since 1974.

34. On April 22, 1981, in connection with a Freedom of Information Act request from the American Jewish Congress, I forwarded to the General Counsel's office at Treasury the most recent table (prepared in February, 1981) titled "Estimated Outstanding Portfolio Investment in the United States of Oil-Exporting Countries as of Year-End 1980". That table was provided to the General Counsel's office on an "expurgated" basis, without showing details of "country aggregates" for each of the Middle East oil-exporting countries. A copy of that table and the covering memorandum is attached as Exhibit 7.

35. I have been designated by the Assistant Secretary (International Affairs) of the Department of the Treasury as an original "CONFIDENTIAL" classification authority, pursuant to Executive Order 12065, § 1-203 , 1-204 and OASIA Circular No. 80-1, October 1, 1980, and No. 81-1, October 1, 1981. Exercising my judgment as an individual authorized to classify documents "CONFIDENTIAL," I determined at the time that the unauthorized disclosure of the country aggregates on the expurgated portions of the table in question reasonably could be expected to cause identifiable damage to the national security, and, therefore, must remain classi-

fied. On my instructions the table in question was classified "CONFIDENTIAL" on February 13, 1981, stamped with my office's classification stamp, and marked with a date (February 13, 1987) for review for declassification. I declare that the country aggregates on the table are appropriately classified as "CONFIDENTIAL" pursuant to Executive Order 12065.

36. Before forwarding the expurgated verision to the General Counsel's office, and before preparing this and prior affidavits, I personally examined the table again, and determined again that the data, which would have identified the holdings of particular government investors, warranted classification as "CONFIDENTIAL" under the substantive classification criteria as established by EO 12065:

> § 1-301. Information may not be considered for classification unless it concerns . . . (d) foreign relations or foreign activities of the United States (or) scientific, technological or economic matters relating to the national security.
>
> § 1-302. Even though information is determined to concern one or more of the (above) criteria . . . , it may not be classified unless an original classification authority also determines that its unauthorized disclosure reasonably could be expected to cause at least identifiable harm to the national security.
>
> § 1-104. "Confidential" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause identifiable damage to the national security.

§ 6-104. "National security" means the . . . foreign relations of the United States.

37. The table in question, and others like it, have been classified "CONFIDENTIAL" because publication of the "country aggregates" for particular types of investment by each of Saudi Arabia, Kuwait, and the United Arab Emirates reasonably could be expected to cause identifiable harm to the national security.

38. The governments in question have on numerous occasions expressed their concern that investments of their countries in the United States be held confidential. Indeed, as is set forth in paragraph 5 of the unclassified affidavit of the Deputy Assistant Secretary of Treasury Charles Schotta, submitted herewith, representatives of each of these three countries have personally communicated to him that their governments object to a release of country-by-country data with respect to portfolio investments from their countries in the United States. The Treasury Department has made clear to the governments of the countries concerned that the confidentiality of their investments in the United States will be maintained and continued. The governments in question have relied on those assurances. Disclosing the country aggregates sought by the American Jewish Congress would be a breach of faith by the United States which would not only harm our foreign relations with the countries in question, but could cast doubt on the credibility of our undertakings vis-a-vis other countries.

39. I have sought to apply classification to the material strictly in keeping with the spirit of the FOIA, which calls

for release of as much information as possible, while at the same time preventing damage to the national security through disclosure of too much information. I also have been mindful of the provisions of the Survey Act, which direct the President, "to the extent he deems necessary and feasible," to publish for the use of the general public . . . periodic, regular, and comprehensive statistical information collected pursuant to" the Act. I thus have released reasonably segregable portions of the documents in question without disclosing classified information. I have, however, found it necessary to withhold a portion of the table in question. In my judgment, to have done otherwise would have resulted in the release of classified information, the disclosure of which could reasonably be expected to damage national security. If the disclosure were also determined to be a willful violation of 22 U.S.C. § 3104(d), I would be subject to the penalties of the Survey Act. I have explained in as much detail as I can, without making disclosures which could be reasonably expected to damage the national security, the reasons for classifying the table in question under Executive Order 12065. Further specifying the "damage" that could reasonably be expected to occur would, in my judgment, in itself damage the national security.

40. In addition to my determination that the portions of the document addressed by my affidavit meet the substantive requirements of EO 12065, I have also determined that the document has been properly processed in accordance with the procedural requirements of EO 12065. The face of the document has been marked as required, is

stamped with the proper classification designation, and bears a date for review for declassification. Furthermore, the restrictive procedural criteria set forth in EO 12065, § 1-6 have been followed. In my capacity as a declassification authority pursuant to the OASIA Circulars referred to above, I have determined that the expurgated portion of the table continues to meet prescribed classification requirements at this time.

41. I have also determined that the public interest in disclosing the expurgated portion of the table does not outweigh the damage to national security that might reasonably be expected from disclosure, pursuant to EO 12065, § 2-303. The Treasury Department publishes aggregates of the holdings of particular types of portfolio investment holdings for all Middle East oil exporting countries. The table in question itself contains totals for those countries. These public data, in my view, permit public policy analysis of the implications of those holdings for the United States.

March 26, 1982

/s/ C. Dirck Keyser

C. Dirck Keyser
Director
Office of International
Financial Reports

Sworn and subscribed to before me this 26th day of March 1982 in the District of Columbia.

/s/ Alice K. Tambellini

Notary Public
My Commission Expires May 31, 1982

Statutory Materials

Statutory Materials

5 U.S.C.

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

• • •

(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

• • •

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be

withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

• • •

22 U.S.C.

§ 286f. Obtaining and furnishing information to Fund

Required disclosure

(a) Whenever a request is made by the Fund to the United States as a member to furnish data under article VIII, section 5, of the Articles of Agreement of the Fund, the President may, through any agency he may designate, require any person to furnish such information as the President may determine to be essential to comply with such request. In making such determination the President shall seek to collect the information only in such detail as is necessary to comply with the request of the Fund. No information so acquired shall be furnished to the Fund in such detail that the affairs of any person are disclosed.

• • •

Penalty for unlawful disclosures

(c) It shall be unlawful for any officer or employee of the Government, or for an advisor or consultant to the Government to disclose, otherwise than in the course of official duty, any information obtained under this section, or to use any such information for his personal benefit. Whoever violates any of the provisions of this subsection shall, upon conviction, be fined not more than $5,000, or imprisoned for not more than five years, or both.

Definition of person

(d) The term "person" as used in this section means an individual, partnership, corporation or association.

July 31, 1945, c. 339, § 8, 59 Stat. 515

EXECUTIVE ORDER NO. 10033

Feb. 8, 1949, 14 F.R. 561, as amended by Ex.Ord.No. 11269, Feb. 14, 1966, 31 F.R. 2813; Ex.Ord.No. 12013, Oct. 7, 1977, 42 F.R. 54931

REGULATIONS GOVERNING THE PROVIDING OF STATISTICAL INFORMATION TO INTERGOVERNMENTAL ORGANIZATIONS

Sec. 2(a) The National Advisory Council on International Monetary and Financial Policies, hereinafter referred to as the National Advisory Council, shall determine, after consultation with the Secretary, what information is essential in order that the United States Government may comply with official requests for information received from the International Monetary Fund or the International Bank for Reconstruction and Development.

(b) The Secretary shall determine which Federal executive agency or agencies shall collect or make available information found essential under section 2(a) hereof.

(e) As used in this order, the word "person" means an individual, partnership, corporation, or association.

Statutory Materials

22 U.S.C.

Chapter 46—International Investment Survey

§ 3101. Congressional statement of findings and declaration of purpose

(a) The Congress finds and declares that—

(1) the United States Government is presently authorized to collect limited amounts of information on United States investment abroad and foreign investment in the United States;

(2) international investment has increased rapidly within recent years;

(3) such investment significantly affects the economies of the United States and other nations;

(4) international efforts to obtain information on the activities of multinational enterprises and other international investors have accelerated recently;

(5) the potential consequences of international investment cannot be evaluated accurately because the United States Government lacks sufficient information on such investment and its actual or possible effects on the national security, commerce, employment, inflation, general welfare, and foreign policy of the United States;

(6) accurate and comprehensive information on international investment is needed by the Congress to develop an informed United States policy on such investment; and

(7) existing estimates of international investment, collected under existing legal authority, are limited in scope and are based on outdated statistical bases, reports, and information which are insufficient for policy formulation and decisionmaking.

(b) It is therefore the purpose of this chapter to provide clear and unambiguous authority for the President to collect information on international investment and to provide analyses of such information to the Congress, the executive agencies, and the general public. It is the intent of the Congress that information which is collected from the public under this chapter be obtained with a minimum burden on business and other respondents and with no unnecessary duplication of effort, consistent with the national interest in obtaining comprehensive and reliable information on international investment.

(c) Nothing in this chapter is intended to restrain or deter foreign investment in the United States or United States investment abroad.

§ 3102. Definitions

As used in this chapter, the term—

• • •

(2) "foreign", when used in a geographic sense, means that which is situated outside the United States or which belongs to or is characteristic of a country other than the United States;

(3) "person" means any individual, branch, partnership, associated group, association, estate, trust,

corporation, or other organization (whether or not organized under the laws of any State), and any government (including a foreign government, the United States Government, a State or local government, and any agency, corporation, financial institution, or other entity or instrumentality thereof, including a government-sponsored agency);

• • •

(5) "foreign person" means any person resident outside the United States or subject to the jurisdiction of a country other than the United States;

• • •

(9) "international investment" means (A) the ownership or control, directly or indirectly, by contractual commitment or otherwise, by foreign persons of any interest in property in the United States, or of stock, other securities, or short- and long-term debt obligations of a United States person, and (B) the ownership or control, directly or indirectly, by contractual commitment or otherwise, by United States persons of any interest in property outside the United States, or of stock, other securities, or short- and long-term debt obligations of a foreign person;

(10) "direct investment" means the ownership or control, directly or indirectly, by one person of 10 per centum or more of the voting securities of an incorporated business enterprise or an equivalent interest in an unincorporated business enterprise; and

(11) "portfolio investment" means any international investment which is not direct investment.

§ 3103 Presidential authority and duties

Data collection program; studies and surveys; periodic report to congressional committees; statistical information publication

(a) The President shall, to the extent he deems necessary and feasible—

(1) conduct a regular data collection program to secure current information on international capital flows and other information related to international investment, including (but not limited to) such information as may be necessary for computing and analyzing the United States balance of payments, the employment and taxes of United States parents and affiliates, and the international investment position of the United States;

(2) conduct such studies and surveys as may be necessary to prepare reports in a timely manner on specific aspects of international investment which may have significant implications for the economic welfare and national security of the United States;

(3) study the adequacy of information, disclosure, and reporting requirements and procedures relating to international investment; recommend necessary improvements in information recording, collection, and retrieval and in statistical analysis and presentation relating to international investment; and report periodically to the Committee on Foreign Relations and Commerce of the Senate and the Committee on Foreign Affairs of the House of Representatives on national

and international developments with respect to laws and regulations affecting international investment; and

(4) publish for the use of the general public and United States Government agencies periodic, regular, and comprehensive statistical information collected pursuant to this subsection and to the benchmark surveys conducted pursuant to subsections (b) and (c) of this section.

* * *

Benchmark survey of foreign portfolio investment in United States and United States portfolio investment abroad; report to Congress

(c)(1) The President shall conduct a comprehensive benchmark survey of foreign portfolio investment in the United States at least once every five years and, for such purposes, shall (among other things and to the extent he determines necessary and feasible) determine the magnitude and aggregate value of portfolio investment, form of investments, types of investors, nationality of investors and recorded residence of foreign private holders, diversification of holdings by economic sector, and holders of record.

(2) In addition to the benchmark surveys conducted pursuant to paragraph (1), the President shall conduct a benchmark survey of United States portfolio investment abroad and, for such purpose, shall (among other things and to the extent he determines necessary and feasible) determine the magnitude and aggregate value of portfolio investment, form of investments, types of investors, nation-

ality of investors and recorded residence of private holders, diversification of holdings by economic sector, and holders of record. The President shall complete such survey not later than the end of the five-year period beginning on October 11, 1976. After completion of such survey, the President shall report to the Congress on the feasibility and desirability of conducting, on a periodic basis, additional benchmark surveys of United States portfolio investment abroad. If he determines that such additional benchmark surveys are feasible and desirable, he may conduct such surveys.

§ 3104. Rules and regulations

Authorization

(a) The authorities and responsibilities under this chapter may be exercised through such rules and regulations as may be necessary to carry out the purposes of this chapter.

Recordkeeping and reports

(b) Rules or regulations issued pursuant to this chapter may require any person subject to the jurisdiction of the United States—

(1) to maintain a complete record of any information (including journals or other books of original entry, minute books, stock transfer records, lists of shareholders, or financial statements) which is essential to carrying out the international investment surveys and studies to be conducted under this chapter; and

(2) to furnish, under oath, any report containing information which is determined to be necessary to carry out the international investment surveys and studies conducted under this chapter.

Access to information; limitation

(c) Access to information obtained under subsection (b)(2) of this section shall be available only to officials or employees designated to perform functions under this chapter, including consultants and persons working on contracts awarded pursuant to this chapter. Subject to the limitation of paragraph (1) of this subsection, the President may authorize the exchange between agencies or officials designated by him of information furnished by any person under this chapter as he deems necessary to carry out the purposes of this chapter. Nothing in this section shall be construed to require any Federal agency to disclose to any official exercising authority under this chapter any information or report collected under legal authority other than this chapter where disclosure is prohibited by law. Information collected pursuant to subsection (b)(2) of this section may be used only—

(1) for analytical or statistical purposes within the United States Government; or

(2) for the purpose of a proceeding under subsection (d) of this section or under section 3105(b) or (c) of this title.

No official or employee designated to perform functions under this chapter, including consultants and persons working on contracts awarded pursuant to this chapter,

may publish or make available to any other person any information collected pursuant to subsection (b)(2) of this section in a manner that the person who furnished the information can be specifically identified except as provided in this section. No person can compel the submission or disclosure of any report or constituent part thereof collected pursuant to this chapter, or any copy of such report or constituent part thereof, without the prior written consent of the person who maintained or furnished such report under subsection (b) of this section and without prior written consent of the customer, where the person who maintained or furnished such report included information identifiable as being derived from the records of such customer.

Penalty

(d) Any person who willfully violates subsection (c) of this section shall, upon conviction, be fined not more than $10,000, in addition to any other penalty imposed by law.

Reporting, recordkeeping and documentation

(e) Activities shall be conducted so that information obtained pursuant to this chapter shall be timely and useful in the development of policy with respect to international investment. Reporting and recordkeeping requirements imposed under this chapter shall be designed in order to minimize costs to the extent feasible, consistent with effective enforcement and the compilation of information required by this chapter. Reporting, recordkeeping, and documentation requirements shall be periodically reviewed and revised in the light of developments in the field of information technology.

Costs for collecting information

(f) In collecting information under this chapter, the President shall give due regard to the costs incurred by persons supplying such information, as well as to the costs incurred by the Government, and shall insure that the information collected is only in such detail as is necessary to fulfill the stated purposes for which the information is being gathered.

Executive Order 12065

SECTION 1. ORIGINAL CLASSIFICATION.

1-1. *Classification Designation.*

* * *

1-104. "Confidential" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause identifiable damage to the national security.

* * *

1-3. *Classification Requirements.*

1-301. Information may not be considered for classification unless it concerns:

* * *

(b) foreign government information;

* * *

(d) foreign relations or foreign activities of the United States;

1-302. Even though information is determined to concern one or more of the criteria in Section 1-301, it may not be classified unless an original classification authority also

determines that its unauthorized disclosure reasonably could be expected to cause at least identifiable damage to the national security.

1-303. Unauthorized disclosure of foreign government information or the identity of a confidential foreign source is presumed to cause at least identifiable damage to the national security.

• • •

1-6. *Prohibitions.*

1-601. Classification may not be used to conceal violations of law, inefficiency, or administrative error, to prevent embarrassment to a person, organization or agency, or to restrain competition.